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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TAYRON JERMAINE JONES, Defendant and Appellant.	D043623 (Super. Ct. No. SCD175826)

APPEAL from a judgment of the Superior Court of San Diego County, Larrie R. Brainard, Judge. Affirmed.

On July 3, 2003, defendant Tayron Jermaine Jones sold .52 grams of cocaine to an undercover police officer. A jury convicted him of two counts of violating Health and Safety Code section 11352, subdivision (a) (transporting a controlled substance and selling, furnishing or giving away cocaine base), and one count of violating Health and Safety Code section 11351.5 (possession of cocaine base for sale). Jones admitted prior convictions for second degree burglary and unlawful sexual intercourse. Sentenced to

prison for a term of five years, he appeals. Jones contends his state and federal constitutional rights not to be placed twice in jeopardy for the same offense were violated when the trial court dismissed the entire jury without legal cause or consent and impaneled another jury which tried and convicted him. For reasons explained in this opinion, we disagree. Therefore, we affirm the judgment.

I

PROCEDURAL SUMMARY

A four-count information was filed against Jones on July 22, 2003. Jury trial commenced on September 10, 2003. On September 16, 2003, a mistrial was declared as to the entire case after the jury notified the court that it was unable to reach a unanimous decision on counts 1 through 3.[1] On September 22, 2003, Jones's motion to dismiss was denied without prejudice.[2]

The second jury trial commenced on November 13, 2003. On the first day of trial both sides made opening statements. The next morning three jurors called the court. Juror No. 8 informed the court that he was at the hospital with his baby, who was running an extreme fever. Juror No. 9 said he could not be available until 1:30 p.m. because his nine-month-old son was sick and he had no childcare until that time. Juror No. 3 said a

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1 The record before us does not reveal, and the parties have not informed us, of the fate of count 4. We know only that it was not presented to the jury that convicted Jones, and that it is not an issue in this appeal.

2 The record does not reveal the grounds on which this motion was made. No issue is raised in this appeal concerning the denial of the motion.

business emergency had arisen that required his presence at Qualcomm and a possible flight to Korea the next day. The court excused Juror No. 8, and ordered Juror Nos. 3 and 9 to report to court at 1:30 p.m.

Outside the presence of the jury, the court informed counsel of its actions. The prosecutor expressed concern that Juror No. 8 had been excused without notification to the prosecution. She had proposed, apparently in a conversation with the court clerk before court convened, that the matter be trailed until Monday. Defense counsel objected to trailing the matter to Monday.

In the presence of the jury, the court explained that Juror No. 8 had been excused because his "child went into the hospital last night, apparently with a high fever. They're home, but have been up all night and frazzled and we're going to have to excuse him." The court replaced Juror No. 8 with the sole alternate, and recessed until 1:30 p.m. when Juror Nos. 3 and 9 could be present.

When the jury reported to court that afternoon, the court explained to Juror No. 3 in the presence of the entire panel: "I'll apologize for not being able to let you out, but I had to make some choices and I felt a hospitalized kid was more important than — than perhaps what your boss wanted you to do, so you can just blame it on me, and I hope — I hope that you will give us your full attention; is that correct sir?" Juror No. 3 replied, "I'm not sure I'll be able to do that." The court stated, "Now here's the deal, I don't want to play games about this. If you are not here, we have to start over and pick a whole new jury. And we certainly don't want to do that and you can understand that, right? [¶] . . . I'm not trying to be mean spirited to you, but we have business to conduct, just like

Qualcomm does. And you did promise to hear this case and to be here and give us your full attention. And obviously I want you to — I hope that you have the pride to do that. [¶] What do you think?" Juror No. 3 promised to give the case his full attention while he was in court. Defense counsel nonetheless requested, at sidebar, that the juror be excused in order to avoid the possibility of rushing deliberations. The prosecutor also expressed concern that the juror would not be able to concentrate. She suggested they ask the juror more questions to assure he could be impartial and deliberate. The court noted that the juror was "hesitant" and "obviously . . . not happy to be here." The court also agreed that the juror's body language was negative, indicating he was "angry." After extended discussion, the court agreed to question the juror further. In response to questioning, apparently in chambers, Juror No. 3 stated he was stressed and "not so sure that I can give it my 100 percent." He stated he could not be fair and give the trial his attention even if the trial were to last only three days.

The prosecutor suggested the matter trail to Monday in the hope Juror No. 8 could return to the jury by then. Alternatively, she offered to stipulate to a jury of 11 people. Defense counsel stated he could not do so. He requested a mistrial.

The court called the jury into court and, in its own words, "castigat[ed]" Juror No. 3 for what he was "doing to . . . the court system and the fellow jurors." The court then excused him. The court informed the jury that it was attempting to reach Juror No. 8 to see if he could return to duty on Monday.

During a recess the court informed counsel that Juror No. 8 could be present Monday morning. The court stated: "The record should also reflect that I've been in

phone contact with [Juror No. 8], that's the juror who had the baby who they had to take to the hospital last night with a high fever. He says they now have that baby home and there's still a fever and it's better and he does think he'll be okay to be here Monday, so my current plan is to bring the jurors back Monday, place [Juror No. 8] back in, who is a sworn juror, we would have 12 and hopefully go forward."

Defense counsel moved for a mistrial on the ground that there were, at that point, only 11 sworn jurors, inasmuch as Juror No. 8 had been excused and not admonished. The court noted there were 12 sworn jurors, counting Juror No. 8, who had "heard every admonition every other juror has heard."

The court called the jury in and explained that trial would proceed on Monday, when Juror No. 8 could be present. The court observed: "I think all of us who have been parents know that young children do run high fevers and it is very scary, but they also pass quickly. . . . That's the way it is."

On Monday, November 17, 2003, Juror No. 8 was present in court, but both counsel objected to allowing him to be returned to the jury. The prosecutor informed the court she believed the problem created a jurisdictional issue which could not be "overcome." She suggested a stipulation to 11 jurors. Defense counsel stated he was not willing to stipulate to an 11-member jury or to reinstatement of Juror No. 8. After recounting the facts of the situation the court concluded it lacked jurisdiction to reinstate Juror No. 8. The court asked defense counsel if he was moving for a mistrial. Counsel requested the case be dismissed on the ground that jeopardy had attached. The court asked: ". . . I only have 11 jurors and I can't go forward and what do you want me to do?

Do you want me to bring in a few jurors and get one or do you want me to select an entire new panel? And I would have to declare a mistrial, discharge this panel and bring in a new panel and start over." Defense counsel replied: "At this point, Your Honor, we're asking the court to dismiss the case; that's our request." The court found there was "no basis for doing that." It declared a mistrial, explaining that it was necessary to call a new panel in order to have a 12-person jury.

Over defense counsel's objection, a new panel of jurors was called to the courtroom. Jones entered a plea of once in jeopardy. The trial court denied the motion to dismiss, and trial commenced.

II

DISCUSSION

Article I, section 15 of the California Constitution and the Fifth Amendment to the United States Constitution both prohibit placing a person twice in jeopardy for the same offense. (*People v. Monge* (1997) 16 Cal.4th 826, 844.) Jeopardy attaches when the jury is impaneled and sworn. The state constitutional prohibition against double jeopardy bars retrial where a sworn jury is discharged without a verdict unless the defendant consents to the discharge or legal necessity requires the discharge. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.) "In California, legal necessity for a mistrial typically arises from an inability of the jury to agree [citations] or from physical causes beyond the control of the court [citations], such as death, illness, or absence of judge or juror [citations] or of the defendant [citations]. A mere error of law or procedure, however, does not constitute legal necessity." (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 713-714.) The federal

constitutional prohibition bars retrial unless the defendant consents or there is a "manifest necessity" to declare a mistrial. (*People v. Gurule* (2002) 28 Cal.4th 557, 646.)

The California Constitution also guarantees a criminal defendant the right to be tried by a jury of 12 persons. (Cal. Const., art. I, § 16.) Thus, there is a legal necessity for a mistrial when, due to physical causes beyond the control of the court, a sworn juror is absent or unable to participate, leaving fewer than 12 jurors to try the case. (See *People v. Ames* (1975) 52 Cal.App.3d 389, 392; *People v. Loving* (1977) 67 Cal.App.3d Supp. 12, 16.) Where, as in this case, the deficiency of jurors results from the dismissal by the court of one or more jurors, the question is whether the court abused its discretion in excusing the juror or jurors. No abuse is demonstrated where the record reflects, as a "demonstrable reality," that the excused juror was unable to perform his or her duties. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) Where that showing is lacking, however, there is no legal justification for the dismissal of the juror. (See *People v. Davis* (1972) 27 Cal.App.3d 115, 119.) But even where a sworn juror has been improperly excused, there is no violation of the prohibition against double jeopardy so long as there is an alternate juror available to serve on the jury. (*People v. Hernandez* (2003) 30 Cal.4th 1, 9-10.)

In this case, it appears that the trial court abused its discretion in excusing Juror No. 8. The court explained on the record the reason the juror requested to be relieved of jury duty, i.e., his child's trip to the hospital with a very high fever; there is no indication on the record that the court asked the juror any questions about his ability to perform his duties, whether on that day (a Friday) or a subsequent day. Instead, the court indicated

merely that the juror had not slept and was "frazzled." If the court had inquired, as it did later in the day, whether the juror could be present for trial on the next trial day, the following Monday, it is clear from the record that the answer would have been in the affirmative. Further, if the court had conducted "an appropriate hearing in the presence of litigants and counsel on the question of the juror's ability to serve" (*In re Mendes* (1979) 23 Cal.3d 847, 852), it is reasonable to expect that fact would have been discovered, thus giving the parties an opportunity to object. On this record we conclude the trial court abused its discretion in dismissing Juror No. 8.

The dismissal of Juror No. 8 did not result in a violation of Jones's right to be free from double jeopardy, however, because Juror No. 8 was replaced by a sworn alternate. As the California Supreme Court explained in *People v. Hernandez*, *supra*, 30 Cal.4th 1, 8-9:

> "'The reason for holding that jeopardy attaches when the jury is empanelled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. That interest was described in *Wade v. Hunter* [(1949) 336 U.S. 684] as a defendant's "valued right to have his trial completed by a particular tribunal." [Citation.] It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together *a jury should not be discharged* until it had completed its solemn task of announcing a verdict.' [Citation.] [¶] Here, defendant's chosen jury was not discharged but instead, with the substitution of a preselected alternate juror, remained intact until a verdict was rendered. . . . [¶] Cases from other jurisdictions uniformly hold that the discharge of an individual juror and substitution of an alternate does not terminate jeopardy. [Citations.] Even an improper discharge does not invoke double jeopardy and bar retrial. [Citations.]"

Under the holding of *Hernandez,* the discharge of Juror No. 8, even though improper, did not terminate jeopardy. Jones does not suggest that he was otherwise prejudiced by the error. Therefore, we continue our analysis with the situation that developed *after* Juror No. 8 was excused and replaced by the sole alternate.

When Juror No. 3 stated he could not give this case his full attention while he was in court, he made it clear that he was unable to perform his duties. In light of this demonstrable reality, the trial court did not abuse its discretion in excusing him. (*People v. Cleveland, supra,* 25 Cal.4th at p. 474.) Neither party objected to his dismissal in the trial court, and neither suggests in this appeal that it was error to do so. The dismissal of Juror No. 3 left only 11 sworn jurors remaining to try the case, a classic situation in which the legal necessity for a mistrial undermines a defendant's plea of once in jeopardy.

In an effort to avoid this conclusion, Jones argues that a mistrial was *not* a legal necessity because the trial court could have called for potential alternate jurors, conducted voir dire, and allowed the parties to select a replacement for Juror No. 3 under Penal Code section 1089.[3] He is mistaken. If the need for an additional alternate had

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3 Penal Code section 1089 provides: "Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed any indictment or information or complaint, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as 'alternate jurors.' [¶] The alternate jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges . . . . [¶] . . . [¶] If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw

arisen immediately after the impaneling and swearing of the jury, the court could have done as Jones now suggests. (See *People v. Davis*, *supra*, 27 Cal.App.3d 115, 121.) While Penal Code section 1089 does not allow for the reopening of jury selection mid-trial, there is a code section which grants a trial court the power to reopen jury selection, found in Code of Civil Procedure section 233, and it requires the consent of all parties.[4] (See *People v. Griffin* (2004) 33 Cal.4th 536, 567.) The Attorney General argues that the trial court afforded Jones this opportunity, but that he refused, leaving the court with no alternative but to declare a mistrial. The record reveals that immediately before it declared a mistrial the trial court mentioned the possibility of bringing more potential jurors into court from which to "select another juror and alternate." It also questioned whether defense counsel wanted "to bring in a few jurors and get one or . . . to select an

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the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

[4] Code of Civil Procedure section 233 provides: "If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew."

entire new panel." But defense counsel responded with a request for dismissal of the case.[5]

We do not suggest that defense counsel's motion for dismissal acted as a forfeiture of any valid double jeopardy issue he might otherwise have had. The absurdity of requiring a defendant to consent to reopening jury selection in order to preserve a double jeopardy issue on appeal is obvious. We conclude, however, that after Juror No. 3 was properly excused, leaving only 11 jurors to try the case, there was no double jeopardy bar to the dismissal of the jury and the impaneling of a new and different jury.

Jones's contention to the contrary is based upon the premise that this court should view the dismissal of Juror Nos. 3 and 8 as a single event, calling for a single analysis, i.e., that the improper dismissal of Juror No. 8 was the direct cause of the deficiency in the number of jurors remaining to try the case. That is not the case, however. Therefore, no error has been demonstrated.

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5 Jones argued in his reply brief that the trial court "would have been well within legal boundaries by calling for a panel of prospective jurors from which to select a 12th member, irrespective of whether there was any request for, or consent to such action by defense trial counsel." At oral argument defense counsel took the contrary position that selection of a 12th juror from a different panel would have violated his constitutional right to the panel of his choosing. We need not discuss either of these conflicting stances given our resolution of the matter.

DISPOSITION

For the foregoing reasons, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.